JURISDICTIONAL STATEMENT.

Jurisdiction is based upon Section 344 (b), Title 28 U. S. C., which is in part as follows: "Where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, • • • or statute of • • • the United States". (U. S. C., Title 28, Sec. 344 (b)).

The date of the original decision of the Appellate Court of Illinois sought to be reviewed is July 1, 1941 (Rec. 167); the petition of petitioner for leave to appeal from the judgment of the Appellate Court to the Supreme Court of Illinois was denied January 20, 1942, making final the judgment of the highest court of the State of Illinois, in which a decision could be had (Rec. 171).

The opinion of the Appellate Court of Illinois appears at page 173 of the record. It is also reported in 311 Ill. App. 354 and in 36 N. E. (2d) 267. No opinion was filed in the Supreme Court of Illinois.

The federal question presented is the denial by the highest court of the State of Illinois, in which a decision could be had, of the right claimed by petitioner to recover damages for the death of the deceased, under a statute of the United States, namely, the Federal Employers Liability Act (U. S. Code, Title 45, Sections 51 *et seq.*).

THE QUESTIONS PRESENTED.

1. Does the record contain evidence sufficient to sustain the verdict of the jury, finding that the death of Probert was caused in whole or in part by the negligence of respondent?

2. Does the record, by all the evidence, show that the death of Probert was caused solely by his own negligence,

the burden of proof concerning contributory negligence being upon respondent? (*Central Vermont Ry.* v. *White*, 238 U. S. 507.)

3. Probert was not guilty of negligence in attempting to set out the bad order car on the house track.

4. Probert did not disobey the order of the train dispatcher to put the train on the passing track, by attempting to set out the bad order car on the house track. The order as given had no reference to, and did not take into consideration the presence of a bad order car in the train.

5. When Probert discovered the bad order car, it created an emergency, upon which he had to act on his own judgment. In the absence of the conductor and the rear brakeman he was in charge of the train.

6. In the circumstances the proper thing for Probert to do was to set out the bad order car on the house track.

7. It is our contention that the Appellate Court of Illinois, by its opinion and judgment, erroneously found that the death of Probert did not result in whole or in part from the negligence of respondent, and also in finding that the death of Probert was caused solely by his own negligence. In making these findings the Appellate Court ignored and disregarded the evidence in the case, upon which evidence the jury and trial court properly found that respondent was guilty of negligence in whole or in part resulting in the death of Probert, and that the death of Probert was not caused solely by his own negligence.

8. By these findings and the judgment of the Appellate Court based upon said findings, and the judgment of the Supreme Court of Illinois denying petitioner's petition for leave to appeal to the Supreme Court of Illinois, the petitioner and the widow and minor son of Probert were deprived of their right to trial by jury.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Appellate Court of Illinois has decided a federal question of substance in a way clearly not in accord with applicable decisions of this Court. (Rule 38, 5 (a) of U. S. Sup. Ct.)

2. The Appellate Court of Illinois by its decision has deprived petitioner, and the deceased's beneficiaries, of their right to trial by jury in a claim based upon the Federal Employers Liability Act.

3. The instant case comes plainly within the purview of the following rule of this Court, as to what reasons will be considered for granting a writ of certiorari: Rule 38, 5 (a), "Where a state court has decided a federal question * * * in a way probably not in accord with applicable decisions of this court."

WHEREFORE, Petitioner prays that a writ of certiorari be issued, by this Court, directed to the Appellate Court of Illinois, in and for the First District, commanding that Court to certify and send to this Court a transcript of its record and proceedings, and that the judgment of the said Appellate Court of Illinois, in and for the First District, may be reviewed and reversed by this Honorable Court, and that the judgment of the Superior Court of Cook County, Illinois, be affirmed, and that petitioner may have such other and further relief as is proper.

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